extremely few, who have fallen foul of the law and this may perhaps on the whole have appeared to you a little dismal. But it is the dark side of things that brings out more fully the brighter side and the medical profession in Malta has indeed a very bright record. After you have heard all this, I should not like any of you to look upon the law with even the slightest degree of unfriendliness, for may I conclude by saying – and I firmly believe this – that the law is indeed the best friend of an honest man.

DOES 'LEGAL RELATIONSHIP' CONSTITUTE AN IMPEDIMENT TO MARRIAGE IN MALTA?

A. DEPASQUALE

1. NOTION OF 'LEGAL RELATIONSHIP'.

By 'Legal Relationship' we are here understanding specifically that special relationship in law that arises between an adopter and the person adopted by him in any way which, according to the laws of the country, constitutes a true legal adoption. This special relationship lies in the fact that, once legal adoption has truly taken place to the full satisfaction of the law, in the eyes of the law in most respects and almost as a general rule the adopted child assumes the same relationship to the adopter (or adopting spouses) as any child born in lawful marriage bears to his parents.

2. 'LEGAL RELATIONSHIP' IN THE LAW OF MALTA REGARDING MARRIAGES.

The Civil Code of Malta, while regulating the rights and duties arising from validly contracted Marriage together with such other civil effects as filiation and parental authority does not say how Marriage is to be validly celebrated in Malta. It fails to make any provisions either about the formalities required in its celebration or about the essential requisites on the part of the spouses contracting Marriage that could affect its validity.

It is, however, the constant doctrine and practice of our Civil Courts to require that marriages celebrated in Malta between parties of whom at least one is a member of the Catholic Church be

celebrated according to the form laid down by Canon Law and that such marriages be regulated also as regards 'essentials' by the Canon Law of the Catholic Church then applying. Among these 'essentials' one finds the juridical capability of both parties of contracting Marriage according to the law. This capability does not exist wherever a 'canonical impediment' to Marriage comes between the parties. This occurs when there is any circumstance which, according to Canon Law, affects the juridical capability of the parties to contract Marriage either by making it simply unlawful for them to contract it ('simply prohibitive impediments') or even by rendering them incapable of marrying validly ('diriment impediments').

Our Civil Code lays down no impediments to Marriage when dealing with marriage itself. Yet in view of what we have just said we must conclude that even in Civil Law marriages celebrated in Malta between parties of whom at least one is a member of the Catholic Church are unlawful if affected by a canonical impediment which is simply prohibitive, and altogether invalid if affected by such an impediment that is diriment. The whole question, therefore, seems to boil down to this: Does present-day Canon Law of the Catholic Church include 'legal relationship' among either the prohibitive or the diriment canonical impediments?

3. 'Legal Relationship' in Canon Law regarding Marriages.

This question brings us face to face with a somewhat embarassing situation in Malta. As we have seen, civil society in Malta by custom refers us to Canon Law in all that regards the essentials and formalities of marriage of members of the Catholic Church in Malta. Canon Law, on the other hand, refers us back to Civil Law of each State when speaking of 'legal relationship' as an impediment to marriage. In fact, canon 1059 lays down that: 'In those regions where, according to Civil Law, legal relationship arising from adoption renders marriage unlawful, marriage is unlawful also according to Canon Law'. Canon 1080 similarly states: 'Persons who by Civil Law are held incapable of contracting marriage between themselves because of legal relationship arising from adoption, cannot validly contract marriage between themselves according to Canon Law'.

The existence or otherwise of a prohibitive or diriment impediment of legal relationship arising from adoption, therefore, is made to depend by Canon Law and for Canon Law on the particular

State's decision to make marriages between its members affected by this relationship unlawful or even altogether invalid. While making no such provision when dealing with Marriage, our Civil Code might have something to say about the matter when speaking of the effects of Adoption.

4. EFFECTS OF LEGAL RELATIONSHIP ACCORDING TO MALTA'S ADOPTION LAW.

While nothing in the sections of our Civil Code dealing with adoption (sec. 131 to 153) prior to 1962 even remotely implied the existence of any legal obstacle to marriages between the adopter and the person adopted by him or her, some generic expressions of the Adoption Act, 1962, may easily lead one to assume that such marriages would in Malta be not simply unlawful but even altogether invalid.

The key paragraph of the 1962 Adoption Act is that contained in section 138(a) of our Civil Code[1] which states: 'Upon an adoption decree being made (a) the person in respect of whom the adoption decree is made shall be considered with regard to the rights and obligations of relatives in relation to each other, as the child of the adopter or adopters born to him, her or them in lawful wedlock and as the child of no other person or persons, relationship being traced through the adopter or adopters...'

These generic words of the Adoption Act, 1962 and of our Civil Code can be taken to mean that between the person or persons adopting and the adopted person there arises a diriment impediment to marriage depriving them of the capability of marrying between themselves. For if, once adoption has taken place according to the law, the adopted person acquires the same 'rights and obligations of relatives in relation to each other' as though he were the adopters' child born to them in lawful wedlock, it would seem that he would also contract any limitation of rights such as impediments to marriage under which relatives within certain degrees of kinship labour. Now in Canon Law, which is accepted by the juridical order of our State as applicable to all Catholics domiciled in Malta, there exists the diriment impediment of consanguinity to marriages between blood-relations within certain degrees of kinship: it would therefore follow that between the adopted and the

[1] In this article we shall be quoting the Civil Code as amended up to the 31st. December 1967 unless otherwise indicated.

latter's relatives there arises also the *diriment* impediment of legal relationship.

This interpretation of section 138 of our Civil Code seems to be suggested by the generic wording of the law as well as by the fact that the Adoption Act of 1962 seems set on placing on a par to all intents and purposes the adopted child with the child born in lawful wedlock. One might also see a requirement of decency, to obviate as much as possible dangers of excessive and unlawful 'familiarity' between the adopter and the adopted, a requirement parallel to that existing between in-laws which is adduced to justify the impediment of affinity. Such a requirement to exclude the possibility of the creation of marital relations between the adopted and the adopter could be deemed to have been strong enough to induce our legislators to create the impediment of legal relationship between the adopter and adopted by depriving them by law of the capability of marrying between themselves, just as the legislators of some other countries such as the United Kingdom, Italy, Spain and several Latin American countries have felt it necessary or convenient to do.

5. ANOTHER INTERPRETATION.

It seems to me, however, that another interpretation can be given to these words of section 138 of our Civil Code, more restrictive of their meaning, in such a way that the possibility of marriage between adopter and adopted is not excluded. Besides, reasons can be brought in favour of the non-existence of an impediment to marriage based on the legal relationship arising out of adoption which seem to me *at least* as strong as the reasons that militate in favour of the existence of such an impediment in Malta.

This second, more restrictive, interpretation of the words of section 138 of our revised Civil Code would restrict the 'rights and obligations of relatives in relation to each other' to those referring to maintenance and education (physical, moral and spiritual) of children and to parental authority. In other words they would refer to 'mutual rights and duties of Ascendants, Descendants, Brothers and Sisters, and certain other Persons related to each other by Affinity' that are the subject-matter of sub-title II of Title I of the first book of our Civil Code (sections 14 to 41), as well as to those rights and duties which are governed by Title IV of the same book ('Parental Authority', sections 154 to 184). This interpretation would certainly not allow the expression of section 138 to be

taken to mean the creation of a diriment impediment to marriage between adopter and adopted.

If this interpretation were to seem excessively and arbitrarily restrictive of the expressions of section 138, nevertheless careful study of their context would appear to vindicate its validity. For:

(i) the same subsection (a) of section 138 goes on to deal with the obligations of the wife in cases where the adopters are husband and wife: it does this by excluding the adopting wife's liability to maintain, educate and assign dowry to the adopted child, unless the adopting husband is unable to discharge these obligations. This seems to show that the section is concerned with rights and duties of maintenance and education.[2] This impression is further strengthened by the next two sections of our Civil Code. Section 139, in fact, deals with orders for payment of maintenance, while section 140 deals with property rights between adopter, adopted, and the relatives of the adopter.

(ii) Secondly, by comparing the 1967 amended edition of the Civil Code with the 1942 edition it becomes evident that section 138 of the *new edition* is meant to replace sections 139 to 142 of the older law. These sections of the Old Code speak of the 'duties of the adopter', of 'assignment of dowry to adoptive daughter', of the 'duties of the adoptive mother' and of the 'reciprocal liability for maintenance' respectively: all this in terms of rights and duties connected with the education and maintenance of the adopted child and the latter's duties later in life with respect to the maintenance of his adoptive parents.

[2]The same point can be made by examining a provision in the same section of the 1962 Adoption Act, and consequently in the same subsection (a) of section 138 that has been deleted by section 20 of the Civil Code (Amendment) (No. 2) Act of 1973 as no longer necessary after the reforms in the rights of women introduced by this latter Act. This deleted provision laid down that, in the case of an adoption decree made in favour of a woman who was the sole adopter of a minor, the Court should appoint her by the same decree tutrix of the adopted child, and that the provisions of section 169 of the Civil Code (now also amended), dealing with the usufruct of a widowed mother, who has not remarried, on the property of the children during their minority, would apply to her so long as she did not marry or remarry. This clause in the original Adoption Act of 1962, in fact, once again demonstrates that the 'rights and obligations' for which the legislator was making provision in these sections referred to guardianship, maintenance, education and property rights.

(iii) Thirdly, subsection (b) of section 138 states that: 'the relatives of the person in respect of whom the adoption decree is made shall lose all rights and be freed from all obligations with respect to such person'; that is, to the adopted child. The law is evidently still referring to the same 'rights and obligations of relatives in relation to each other' of subsection (a) whose precise meaning is of such great interest to us for the purpose of this article. Now if we were to admit that this expression in subsection (a) includes also a reference to the existence of an impediment of legal relationship arising out of adoption to a marriage between adopter and adopted, based on the impediment of consanguinity existing between the child and his natural relatives, we cannot logically exclude the impediment of consanguinity from among the 'rights and obligations' that are legally dissolved between the adopted child and his natural relatives in subsection (b). This would lead us to conclude that, as far as it lies within its power, our Civil Law here meant to remove the matrimonial diriment impediment of consanguinity between the adopted child and his natural relatives – something which our Civil Code evidently had no intention of doing. Conversely, it would seem that our legislators had no intention of creating a new impediment to marriage, that of legal relationship arising out of adoption, between adopters and adopted.

Independently of the context of section 138, there seems to be quite a few extrinsic reasons which also postulate and tend to confirm a more restrictive interpretation of the key words of section 138 ('the rights and obligations of relatives in relation to each other') that would in no way demand the existence of a diriment impediment to marriage between an adopter and the adopted. One can summarize these reasons as follows:

(i) If the words of section 138(a) are taken to include also the creation of a diriment impediment of legal relationship arising out of adoption, the adopted child would be incapable of contracting valid marriage not only with his or her adopters but with a whole series of persons related to the adopters by consanguinity.[3] For, being 'considered with regard to the rights and obligations of relatives in relation to each other, as the child of the adopter or adopters born to him, her or them in lawful wedlock and as the child of no other persons or person, relationship being traced through the adopter or adopters...', the adopted child would thus,

[3] That is, by natural generation from a close common ancestor.

even for reasons of marriage and of capability of contracting marriage, have to be considered as though he or she were the natural son or daughter of the adopters not only as regards his or her adopters but also as regards the relatives, by consanguinity, of the adopters. This would mean that the adopted child would be incapable of contracting marriage with all ascendants of the adopters and with all blood-relations of the adopters in the natural collateral line of consanguinity to the third canonical degree, calculating these degrees by considering the adopted child as though he or she were the natural child of the adopters.[4] This line of reasoning could even be carried a step further by postulating, logically, that such a diriment impediment would arise also between the adopted child and other adopted children within the degrees in which marriage is prohibited because of consanguinity. No legal order that I know of postulates the existence of an impediment to marriage of legal relationship arising out of legal adoption that goes so far since, if they admit such an impediment, they generally limit the effect of the impediment to invalidate or prohibit marriage merely between adopters and adopted.

(ii) Our legislators, in drawing up the Adoption Act of 1962 had not only our past legislation on adoption to which they could refer, but also the English Adoption Acts of 1950 and 1958, which explicitly and clearly laid down a diriment impediment (of legal relationship) to the marriage of the adopter with his or her legally adopted child.[5] Had our legislators wanted to create a similar marriage impediment for Malta, they could easily have made special provision for it on the lines of these Acts.

[4] This would exclude all 'adopted' brothers/sisters; uncles/aunts; great-uncles/aunts; nephews/nieces; first and second cousins.

[5] Section 10, subsection (3) of the Adoption Act, 1950 lays down: 'For the purpose of the law relating to marriage, an adopter and the person whom he has been authorised to adopt under an adoption order are deemed to be within the prohibited degrees of consanguinity notwithstanding that by a subsequent order some other person is authorised to adopt the same infant.' And the Adoption Act, 1958, section 13, subsection (3), repeats: 'For the purpose of the law relating to marriage, an adopter and the person whom he has been authorised to adopt under an adoption order shall be deemed to be within the prohibited degrees of consanguinity; and the provisions of this subsection shall continue to have effect notwithstanding that some person other than the adopter is authorised by a subsequent order to adopt the same infant.'

(iii) The English Adoption of Children Act of 1926, in section 5 which deals with the 'Effect of adoption order' subsection (1), contains expressions which closely resemble those of section 138 of our Civil Code, but which are clearly restricted to rights and duties connected with the 'custody, maintenance and education of the adopted child'.[6] None of these or any other similar expressions of the English Act, 1926, were taken to mean the creation of a diriment impediment to marriage between adopter and adopted in English law: so much so that when, in 1950, the new Adoption Act created this impediment between adopter and adopted even if the adoption order had been made under the Adoption of Children Act, 1926, it nevertheless took pains to point out that marriages celebrated before the first day of January, 1950 would not be rendered null, presumably since the impediment started to exist only under the Adoption Act of 1950.[7] Therefore, even though, in English Law the impediment of consanguinity had existed for centuries, expressions similar to those of our present legislation about the effects of an Adoption Order that were contained in the English Adoption of Children Act, 1926, were never interpreted as creating an impediment to marriage, like that of consanguinity, but based on the legal relationship arising out of legal adoption.

6. Conclusion.

There are, therefore, strong reasons in favour of interpreting the

[6] 'Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock: ...'

[7] Cf. Adoption Act, 1950, Fifth Schedule, 1: 'Subsection (3) of section ten of this Act shall apply in relation to an adoption made under the Adoption Act, 1926, ... as if it were an adoption order within the meaning of that subsection:

Provided that nothing in this paragraph shall invalidate a marriage solemnised before the first day of January nineteen hundred and fifty.'

words 'The rights and obligations of relatives in relation to each other' of section 138 of our Civil Code in a way which does not imply the creation of a diriment impediment to marriage between the adopted on one hand and the adopters and their blood-relations on the other. Indeed, it seems to me that these reasons are at least as strong as those that militate in favour of the more extensive interpretation of those words that would see in them the introduction of a new diriment impediment to marriage, that of 'Legal Relationship' based on legal adoption.

As a minimum, therefore, I think that one has to admit that there is room for prudent doubt as to whether the Civil Law of Malta accepts the legal relationship arising out of legal adoption between the adopted on one hand and the adopter and the latter's relatives on the other as constituting an impediment to marriage. Given that the right to marry is a basic natural right of all human beings who are not debarred by divine or legitimate human law from contracting marriage, this clear fundamental right could not be limited by a doubtfully existent law: so much so, that canon 15 of the Code of Canon Law lays down that 'in case of doubt in law, laws are not binding even if they are invalidating or inhabilitating laws'. In fact, it is fair to assume that if our legislators really wanted to create such an impediment to marriage, they would have done so clearly and unequivocally as their British counterparts did in 1950.

All in all, therefore, given the doubtful meaning of section 138 of our Civil Code, and its complete lack of any other reference to the existence of any such impediment of 'Legal Relationship' to marriage, it would seem that none of the natural rights of adopters or their relatives to marry adopted persons have been curtailed by our Civil Law. Hence one cannot but conclude that at present in Malta the impediment of 'Legal Relationship' to marriage does not exist, whether as prohibitive or as diriment, even for Canon Law. It is another matter whether this impediment should be introduced by our Civil legislators: I prefer, however, to leave it up to them and to our sociologists and other competent persons of our community to make up their minds on this question.